

Michelle Lujan Grisham
Governor

Howie C. Morales
Lt. Governor

NEW MEXICO ENVIRONMENT DEPARTMENT

Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469
Telephone (505) 827-2855
www.env.nm.gov



James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

VIA ELECTRONIC MAIL

July 2, 2019

David W. Gray
Regional Administrator
U.S. Environmental Protection Agency Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270-2102
gray.david@epa.gov

Dear Regional Administrator Gray,

As you are aware, the New Mexico Environment Department ("NMED") is actively pursuing judicial enforcement against the U.S. Department of Defense ("DOD") under the New Mexico Hazardous Waste Act and NMED's Resource Conservation and Recovery Act ("RCRA") primacy powers for PFAS contamination related to activities at Cannon Air Force Base and Holloman Air Force Base. The U.S. Environmental Protection Agency ("EPA") is not a party to the judicial proceedings.

On April 3, 2019, during a U.S. Senate hearing to review EPA's fiscal year 2020 funding request and budget justification, Senator Tom Udall asked if EPA Administrator Wheeler would commit to providing technical or legal assistance to the State of New Mexico regarding its PFAS litigation and remediation. Administrator Wheeler stated it was his understanding that EPA provided NMED with assistance already and further stated "...if we have not, we certainly will." Administrator Wheeler also stated that EPA worked with "...a couple dozen states and local communities on enforcement actions for PFAS/PFOA across the country..." and committed to doing so for New Mexico. After securing the Administrator's commitment to assist NMED in its litigation, Senator Udall asked Administrator Wheeler to ensure that EPA supports NMED on a confidential basis and asked the Administrator if he could do that to which Administrator Wheeler stated: "Yes, we do that with federal facilities all around the country in a number of different statutes."

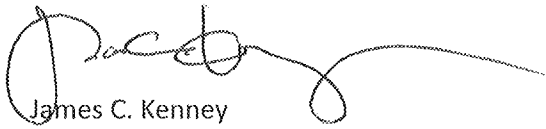
During a May 10, 2019 telephone conference between Matt Leopold, EPA General Counsel, and James Payne, EPA Region 6 General Counsel, Jennifer Hower, NMED General Counsel and myself; EPA informed NMED that it would not join the State's enforcement efforts against a sister executive agency due to the "unitary executive theory" despite the fact that NMED is implementing RCRA on behalf of EPA under a primacy agreement. Aside from holding federal facilities to a lower standard of compliance under RCRA, EPA's lack of engagement on this matter adversely impacts NMED's litigation while leaving communities vulnerable to PFAS pollution.

When asked about opportunities to provide NMED with technical resources related to the litigation, like: risk communication experts, investigation resources, technical experts, contract support, interim control funding, etc.; EPA representatives stated they would look in to doing so but have yet to follow up with NMED.

The State of New Mexico reached the conclusion of the 90-day notice window for pursuing RCRA claims against a federal agency and is proceeding accordingly. NMED encourages EPA to reassess its position regarding collaborative federal/state PFAS enforcement under RCRA. To the extent EPA maintains its current position, this raises serious concerns for NMED regarding EPA's commitment to addressing PFAS contamination and implementation of primacy programs under RCRA.

Both Jennifer Hower and I can be reached at (505) 827-2855 to discuss further.

Sincerely,



James C. Kenney
Cabinet Secretary

Cc: Andrew Wheeler, Administrator, EPA, wheeler.andrew@epa.gov
Matt Leopold, General Counsel, EPA, leopold.matt@epa.gov
James Payne, Regional Counsel, EPA Region 6, payne.james@epa.gov
Jennifer L. Hower, General Counsel, NMED, jennifer.hower@state.nm.us
Stephanie Stringer, Director, Resource Protection Division, NMED, stephanie.stringer@state.nm.us

Message

From: Traylor, Patrick [traylor.patrick@epa.gov]
Sent: 4/4/2019 1:13:41 PM
To: Bodine, Susan [bodine.susan@epa.gov]; Starfield, Lawrence [Starfield.Lawrence@epa.gov]; Leff, Karin [Leff.Karin@epa.gov]
Subject: FW: New Mexico USAF PFAS Litigation

FYSA

Patrick Traylor

Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
202.809.8796 (m)
202.564.5238 (o)

From: Gray, David
Sent: Thursday, April 4, 2019 8:55 AM
To: Kenney, James, NMENV <James.Kenney@state.nm.us>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Seager, Cheryl <Seager.Cheryl@epa.gov>; Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>; Welton, Patricia <Welton.Patricia@epa.gov>
Subject: RE: New Mexico USAF PFAS Litigation

Good morning Secretary Kenney,

Confirming receipt of your note and we will follow up shortly. I've watched the testimony by the Administrator in response to Senator Udall's questions. My initial thought would have us bring in ORC/OGC also. I've copied Patricia Welton in our ORC office.

David

From: Kenney, James, NMENV <James.Kenney@state.nm.us>
Sent: Wednesday, April 3, 2019 11:02 PM
To: Gray, David <gray.david@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Seager, Cheryl <Seager.Cheryl@epa.gov>; Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>
Subject: New Mexico USAF PFAS Litigation

Hi David and Patrick,

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We can also discuss briefly at ECOS next week.

Thank you,
James C. Kenney

Cabinet Secretary
New Mexico Environment Department
1190 St. Francis Drive | Santa Fe, New Mexico 87505
Office: (505) 827-2855 | Mobile: (505) 470-6161
Twitter: @NMEnvDep | #IamNMED
www.env.nm.gov

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Message

From: Kenney, James, NMENV [James.Kenney@state.nm.us]
Sent: 4/18/2019 2:37:45 AM
To: Payne, James [payne.james@epa.gov]
CC: Hower, Jennifer, NMENV [Jennifer.Hower@state.nm.us]; Atencio, Christopher, NMENV [Christopher.Atencio@state.nm.us]; Gray, David [gray.david@epa.gov]; Seager, Cheryl [Seager.Cheryl@epa.gov]
Subject: RE: New Mexico USAF PFAS Litigation

Thank you, James!

From: Payne, James <payne.james@epa.gov>
Sent: Wednesday, April 17, 2019 5:10 PM
To: Kenney, James, NMENV <James.Kenney@state.nm.us>
Cc: Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>; Atencio, Christopher, NMENV <Christopher.Atencio@state.nm.us>; Gray, David <gray.david@epa.gov>; Seager, Cheryl <Seager.Cheryl@epa.gov>
Subject: [EXT] RE: New Mexico USAF PFAS Litigation

Secretary Kenney – thank you for your note. I’m reaching out to Jennifer separately to discuss next steps. Jim Payne 214-665-8170, 214-490-6707 cell

From: Kenney, James, NMENV <James.Kenney@state.nm.us>
Sent: Wednesday, April 17, 2019 7:27 AM
To: Payne, James <payne.james@epa.gov>
Cc: Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>; Atencio, Christopher, NMENV <Christopher.Atencio@state.nm.us>; Gray, David <gray.david@epa.gov>; Seager, Cheryl <Seager.Cheryl@epa.gov>
Subject: New Mexico USAF PFAS Litigation

Good morning, James -

I’m following up on an email exchange (below) and conversations at ECOS between David Gray and myself regarding the PFAS contamination at Cannon and Holloman Air Force Bases.

Can we set up a legal and technical support call between Region 6 and NMED to explore options under a deliberative process? Running point for us on logistics will be Jennifer Hower (General Counsel) and Chris Atencio (Counsel of record for the matter). We may include the New Mexico AG’s office as well since they are representing us in our legal proceedings.

Thank you,
James C. Kenney
Cabinet Secretary
New Mexico Environment Department
Desk (505) 827-2855 | Cell (505) 470-6161
@NMEnvDep | #IamNMED
www.env.nm.gov

Sent from my iPhone

Begin forwarded message:

From: "Gray, David" <gray.david@epa.gov>
Date: April 4, 2019 at 6:55:01 AM MDT

To: "Kenney, James, NMENV" <James.Kenney@state.nm.us>, "Traylor, Patrick" <traylor.patrick@epa.gov>

Cc: "Seager, Cheryl" <Seager.Cheryl@epa.gov>, "Hower, Jennifer, NMENV" <Jennifer.Hower@state.nm.us>, "Welton, Patricia" <Welton.Patricia@epa.gov>

Subject: [EXT] RE: New Mexico USAF PFAS Litigation

Good morning Secretary Kenney,

Confirming receipt of your note and we will follow up shortly. I've watched the testimony by the Administrator in response to Senator Udall's questions. My initial thought would have us bring in ORC/OGC also. I've copied Patricia Welton in our ORC office.

David

From: Kenney, James, NMENV <James.Kenney@state.nm.us>

Sent: Wednesday, April 3, 2019 11:02 PM

To: Gray, David <gray.david@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>

Cc: Seager, Cheryl <Seager.Cheryl@epa.gov>; Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>

Subject: New Mexico USAF PFAS Litigation

Hi David and Patrick,

I wanted to share with you an outcome of the Senate Appropriations hearing that occurred this morning. Administrator Wheeler committed to Senator Udall that EPA would technically and legally support our Department in the enforcement of the PFAS contamination at Cannon and Holloman AFB (see this [link](#) to launch the video and forward to the 1:59:09 mark). Administrator Wheeler also committed to Senator Udall to assist the Environment Department in a manner in which that preserves confidentiality between our organizations. I'd like to set up a call between EPA, the Environment Department and the New Mexico Attorney General to discuss legal and technical assistance from EPA. I assume we should work through Cheryl and would be happy to do so if that is what you recommend. Please advise and we'll get something scheduled asap.

We can also discuss briefly at ECOS next week.

Thank you,

James C. Kenney

Cabinet Secretary

New Mexico Environment Department

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State of New Mexico

Michelle Lujan Grisham
Governor

August 2, 2019

Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: U.S. Air Force PFAS Contamination in New Mexico

Dear Administrator Wheeler,

I am in receipt of a letter dated July 19, 2019 affirming your agency's decision to not assist New Mexico in holding the U.S. Air Force accountable for violating federal and state law related to PFAS contamination of our land and water. The U.S. Environmental Protection Agency's (EPA) decision to not do everything under its current enforcement authorities – whether judicial or administrative – is inconsistent with its mission to protect public health and the environment. Further, it is a demonstrative example of EPA's failure to uphold compliance with federal environmental laws.

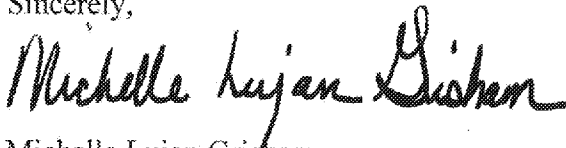
On March 5, 2019, the New Mexico Environment Department (NMED) under the leadership of Secretary James Kenney, initiated a legal action against the U.S. Air Force for violating the State's Hazardous Waste Act. Also, on March 5, 2019, Secretary Kenney sent the U.S. Air Force a letter providing notice that the State of New Mexico intended to pursue claims under the federal Resource Conservation and Recovery Act (RCRA) following the requisite 90-day notice period. You and then Regional Administrator, Anne Idsal, were also sent this letter. On July 24, 2019, a preliminary injunction and amended complaint to include federal RCRA claims were filed in District Court.

Further, you personally committed to Senator Tom Udall on April 3, 2019 during the Senate Appropriations hearing to assist NMED with legal and technical assistance in a confidential manner. None of the activities listed in the July 19, 2019 letter from your General Counsel and Assistant Administrator directly fulfill your commitment to support NMED in a legal or technical manner. Providing factsheets and offering webinars are not meaningful legal and technical assistance in pursuit of state and federal claims that would compel the U.S. Air Force to take responsibility for delineating the PFAS plume, remediating it and protecting our communities.

I stand by Secretary Kenney's assertion in the enclosed letter to Acting EPA Regional Administrator David Gray that a better outcome for environmental enforcement is when EPA is a true collaborative partner. Secretary Kenney is committed to ensuring that New Mexico maintains a robust RCRA program for the citizens of New Mexico pursuant to federal law and primacy agreements with EPA. In turn, I expect EPA will reciprocate by providing any and all necessary support to NMED regarding RCRA enforcement and this specific matter.

I look forward to you fulfilling your commitment to New Mexicans.

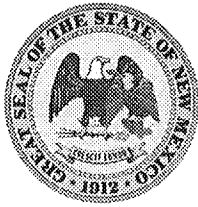
Sincerely,

A handwritten signature in black ink that reads "Michelle Lujan Grisham". The signature is fluid and cursive, with the first name "Michelle" being the most prominent.

Michelle Lujan Grisham
Governor
State of New Mexico

Enclosure

Cc: The Honorable Tom Udall
The Honorable Martin Heinrich
The Honorable Ben Ray Lujan
The Honorable Debra Haaland
The Honorable Xochitl Torres Small
James C. Kenney, Cabinet Secretary, New Mexico Environment Department



Michelle Lujan Grisham
Governor

Howie C. Morales
Lieutenant Governor

**NEW MEXICO
ENVIRONMENT DEPARTMENT**

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James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

August 2, 2019

David Gray
Acting Regional Administrator
U.S. Environmental Protection Agency Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270

RE: U.S. Air Force PFAS Contamination in New Mexico

Dear Mr. Gray,

I am in receipt of the July 19, 2019 letter to Governor Lujan Grisham from the U.S. Environmental Protection Agency's (EPA) Matthew Leopold, General Counsel, and Peter Wright, Assistant Administrator. The EPA states that it is unable to bring a judicial action against another Executive Branch department or agency. EPA concludes that direct and confidential participation in judicial litigation against the Department of Defense (DOD) would conflict with the unitary and uniform execution of law.

The EPA's required legal partnership with the U.S. Department of Justice (DOJ) in litigation is understandable. However, the EPA's reliance on DOJ's Unitary Executive Theory in PFAS litigation against the U.S. Air Force is to the detriment of both the EPA and NMED. It seems logical that if DOJ can represent EPA in Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or Superfund) matters in which it also represents sister federal agencies as Potentially Responsible Parties ("PRPs") the same approach could be applied to RCRA enforcement. Clearly, intra-executive branch judicial enforcement is possible.

Additionally, it is undisputed that EPA is unrestricted from taking administrative enforcement actions against federal agencies under its controlling Acts. Specifically, DOJ's Office of Legal Counsel addressed EPA's authority to enforce Resource Conservation and Recovery Act (RCRA) requirements at federal facilities in its June 14, 2000 opinion titled: *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*.¹ The memo holds that RCRA Section "6001(b)'s authorization of EPA to bring enforcement actions against federal agencies 'pursuant to the enforcement authorities contained in this [title] . . . in the same manner

¹ See: <https://www.epa.gov/sites/production/files/2015-01/documents/ffustpenalty.pdf>

and under the same circumstances as an action would be initiated against another person' is unmistakably clear in authorizing assessment of those penalties against federal agencies."

In 2014, EPA ordered the U.S. Army to take expedited corrective measures at the former Fort Gillem Army base in Forest Park, Georgia at the cost of \$1,003,825. Activities at the base resulted in soil, sediment, surface water, and groundwater contamination. The EPA's compliance order required the U.S. Army to determine the level of risk posed by contaminants to the residents and property owners surrounding Fort Gillem and mitigate any unacceptable risk to those persons. Further, the compliance order required the U.S. Army to identify and test all private drinking water wells and springs in the area, evaluate whether the wells or springs were contaminated, and take all appropriate actions to expeditiously mitigate any unacceptable risks to persons using such wells or springs. This is just one of 314 formal administrative cases the EPA initiated and settled against Executive Branch agencies and departments under RCRA authority according to EPA's Enforcement and Compliance History Online (ECHO) database.

With respect to technical support of our litigation, I appreciate your willingness to assist NMED with groundwater modeling support. Undoubtedly, such technical assistance will benefit our litigation provided such discussions and work products are confidential – meaning EPA refrains from sharing such information with DOJ and the U.S. Air Force. As we previously discussed, NMED would like to enter into a formal agreement to protect NMED's litigation interests.

The residents and local industries impacted by PFAS contamination around Cannon and Holloman Air Force Bases expect clean and safe water. That outcome is best delivered when the EPA and State are true collaborative partners in environmental enforcement. With or without EPA's support, I am committed to ensuring that New Mexico maintains a robust RCRA program for the protection of the citizens of New Mexico.

Should you have any questions about this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'James C. Kenney', with a large, stylized flourish extending to the right.

James C. Kenney
Cabinet Secretary

New Mexico Environment Department

cc: Matthew J. Leopold, EPA General Counsel
Peter Wright, EPA Assistant Administrator
Jennifer Hower, NMED General Counsel

Message

From: Leff, Karin [Leff.Karin@epa.gov]
Sent: 4/4/2019 1:34:57 PM
To: Dalzell, Sally [Dalzell.Sally@epa.gov]; Freyre, Dominique [Freyre.Dominique@epa.gov]; Azad, Ava [Azad.Ava@epa.gov]; Muller, Marie [MULLER.MARIE@EPA.GOV]
Subject: Fwd: New Mexico USAF PFAS Litigation

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Subject: FW: New Mexico USAF PFAS Litigation

FYSA

Patrick Traylor
Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
202.809.8796 (m)
202.564.5238 (o)

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Cc: Seager, Cheryl <Seager.Cheryl@epa.gov>; Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>; Welton, Patricia <Welton.Patricia@epa.gov>
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www.env.nm.gov

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Message

From: Jones, Bruced [Jones.Bruced@epa.gov]
Sent: 8/5/2019 4:09:05 PM
To: DeRobertis, Cecilia [DeRobertis.Cecilia@epa.gov]; Lewis, Jen [Lewis.Jen@epa.gov]; Dalzell, Sally [Dalzell.Sally@epa.gov]
Subject: FW: PFAS Correspondence from New Mexico
Attachments: 2019-08-02 - NM letter to EPA.pdf; ATT00001.htm; 2019-08-02 - NMED letter to EPA Region 6.pdf; ATT00002.htm

FYI

From: Payne, James <payne.james@epa.gov>
Sent: Sunday, August 04, 2019 9:31 AM
To: Jones, Bruced <Jones.Bruced@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Welton, Patricia <Welton.Patricia@epa.gov>
Subject: Fwd: PFAS Correspondence from New Mexico

Sent from my iPhone

Begin forwarded message:

From: "Gray, David" <gray.david@epa.gov>
Date: August 4, 2019 at 6:40:51 AM CDT
To: "Chancellor, Erin" <chancellor.erin@epa.gov>, "Payne, James" <payne.james@epa.gov>, "Crossland, Ronnie" <Crossland.Ronnie@epa.gov>, "Maguire, Charles" <maguire.charles@epa.gov>, "Dwyer, Stacey" <Dwyer.Stacey@epa.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>, "Seager, Cheryl" <Seager.Cheryl@epa.gov>, "Gilrein, Stephen" <gilrein.stephen@epa.gov>, "Welton, Patricia" <Welton.Patricia@epa.gov>, "Larson, Darrin" <Larson.Darrin@epa.gov>
Subject: Fwd: PFAS Correspondence from New Mexico

David Gray
Acting Regional Administrator
EPA Region 6 - Arkansas, Louisiana, New Mexico, Oklahoma, Texas
214-665-8120 o
214-789-2619 c

Sent from my iPhone

Begin forwarded message:

From: "Kenney, James, NMENV" <James.Kenney@state.nm.us>
Date: August 2, 2019 at 6:19:11 PM CDT
To: "Gray, David" <gray.david@epa.gov>
Cc: "leopold.matt@epa.gov" <leopold.matt@epa.gov>, "wright.peter@epa.gov" <wright.peter@epa.gov>, "Hower, Jennifer, NMENV" <Jennifer.Hower@state.nm.us>
Subject: PFAS Correspondence from New Mexico

Hi David,

Please see the attached letters and feel free to give me a call.

Thank you,
James C. Kenney
Cabinet Secretary
New Mexico Environment Department
1190 St. Francis Drive | Santa Fe, New Mexico 87505
Office: (505) 827-2855 | Mobile: (505) 470-6161
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Message

From: Azad, Ava [Azad.Ava@epa.gov]
Sent: 7/22/2019 7:47:02 PM
To: Dalzell, Sally [Dalzell.Sally@epa.gov]; DeRobertis, Cecilia [DeRobertis.Cecilia@epa.gov]
CC: Freyre, Dominique [Freyre.Dominique@epa.gov]
Subject: RE: EPA Response to NMED Letter

Yes, no worries at all! Too many cats. Thanks, Ceci.

Ava Azad
Attorney-Advisor
Federal Facilities Enforcement Office, 2209B
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW (MC 2261A)
Washington, D.C. 20460
P: (202) 564-4473
F: (202) 501-0069

NOTICE: ENFORCEMENT CONFIDENTIAL AND/OR ATTORNEY CLIENT PRIVILEGED: DO NOT RELEASE UNDER FOIA: This message is being sent by or on behalf of an attorney. It is intended exclusively for the individual(s) or entity(s) to whom or to which it is addressed. This communication may contain information that is proprietary, privileged, or confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy, or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately by email and delete all copies of the message.

From: Dalzell, Sally
Sent: Monday, July 22, 2019 3:39 PM
To: DeRobertis, Cecilia <DeRobertis.Cecilia@epa.gov>; Azad, Ava <Azad.Ava@epa.gov>
Cc: Freyre, Dominique <Freyre.Dominique@epa.gov>
Subject: RE: EPA Response to NMED Letter

You are doing great, Ceci—truly!!

From: DeRobertis, Cecilia
Sent: Monday, July 22, 2019 3:39 PM
To: Azad, Ava <Azad.Ava@epa.gov>
Cc: Dalzell, Sally <Dalzell.Sally@epa.gov>; Freyre, Dominique <Freyre.Dominique@epa.gov>
Subject: FW: EPA Response to NMED Letter

Looping in Ava! Whoops! There are too many people to track!

Cecilia De Robertis | Assistant General Counsel
U.S. Environmental Protection Agency, Headquarters | Office of General Counsel
William Jefferson Clinton Federal Building | 1200 Pennsylvania Avenue, NW | Washington, DC 20460
phone: (202) 564-5132 | e-mail: DeRobertis.cecilia@epa.gov

From: DeRobertis, Cecilia
Sent: Monday, July 22, 2019 3:35 PM
To: Freyre, Dominique <freyre.dominique@epa.gov>; Freed, Elisabeth <Freed.Elisabeth@epa.gov>; Currie, Kayla <currie.kayla@epa.gov>; Neves, Peter <Neves.Peter@epa.gov>; Mooney, Charlotte <Mooney.Charlotte@epa.gov>; Foster, Barbara <Foster.Barbara@epa.gov>; Jones, Bruce <Jones.Bruce@epa.gov>; Dalzell, Sally

<Dalzell.Sally@epa.gov>; Leff, Karin <Leff.Karin@epa.gov>

Subject: EPA Response to NMED Letter

Cannon AFB and Holloman AFB Team,

As you may recall, a couple weeks back we received a letter from NMED. It included discussion about: 1) Senator Udall's request for the Administrator to provide technical or legal assistance to the State of NM regarding PFAS litigation; 2) NMED's desire for EPA to reassess our position in this matter.

I've attached EPA's response.

Thanks,
Ceci

Cecilia De Robertis | Assistant General Counsel

U.S. Environmental Protection Agency, Headquarters | Office of General Counsel

William Jefferson Clinton Federal Building | 1200 Pennsylvania Avenue, NW | Washington, DC 20460

phone: (202) 564-5132 | e-mail: DeRobertis.cecilia@epa.gov

Message

From: DeRobertis, Cecilia [DeRobertis.Cecilia@epa.gov]
Sent: 7/22/2019 7:40:18 PM
To: Dalzell, Sally [Dalzell.Sally@epa.gov]
Subject: RE: EPA Response to NMED Letter

You just made me laugh. Thanks for the support.

When it comes to Cannon, there are so many moving parts!

Cecilia De Robertis | Assistant General Counsel

U.S. Environmental Protection Agency, Headquarters | Office of General Counsel
William Jefferson Clinton Federal Building | 1200 Pennsylvania Avenue, NW | Washington, DC 20460
phone: (202) 564-5132 | e-mail: DeRobertis.cecilia@epa.gov

From: Dalzell, Sally
Sent: Monday, July 22, 2019 3:39 PM
To: DeRobertis, Cecilia <DeRobertis.Cecilia@epa.gov>; Azad, Ava <Azad.Ava@epa.gov>
Cc: Freyre, Dominique <Freyre.Dominique@epa.gov>
Subject: RE: EPA Response to NMED Letter

You are doing great, Ceci—truly!!

From: DeRobertis, Cecilia
Sent: Monday, July 22, 2019 3:39 PM
To: Azad, Ava <Azad.Ava@epa.gov>
Cc: Dalzell, Sally <Dalzell.Sally@epa.gov>; Freyre, Dominique <Freyre.Dominique@epa.gov>
Subject: FW: EPA Response to NMED Letter

Looping in Ava! Whoops! There are too many people to track!

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phone: (202) 564-5132 | e-mail: DeRobertis.cecilia@epa.gov

From: DeRobertis, Cecilia
Sent: Monday, July 22, 2019 3:35 PM
To: Freyre, Dominique <freyre.dominique@epa.gov>; Freed, Elisabeth <Freed.Elisabeth@epa.gov>; Currie, Kayla <currie.kayla@epa.gov>; Neves, Peter <Neves.Peter@epa.gov>; Mooney, Charlotte <Mooney.Charlotte@epa.gov>; Foster, Barbara <Foster.Barbara@epa.gov>; Jones, Bruce <Jones.Bruce@epa.gov>; Dalzell, Sally <Dalzell.Sally@epa.gov>; Leff, Karin <Leff.Karin@epa.gov>
Subject: EPA Response to NMED Letter

Cannon AFB and Holloman AFB Team,

As you may recall, a couple weeks back we received a letter from NMED. It included discussion about: 1) Senator Udall's request for the Administrator to provide technical or legal assistance to the State of NM regarding PFAS litigation; 2) NMED's desire for EPA to reassess our position in this matter.

I've attached EPA's response.

Thanks,
Ceci

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phone: (202) 564-5132 | e-mail: DeRobertis.cecilia@epa.gov

Message

From: DeRobertis, Cecilia [DeRobertis.Cecilia@epa.gov]
Sent: 7/22/2019 7:38:43 PM
To: Azad, Ava [Azad.Ava@epa.gov]
CC: Dalzell, Sally [Dalzell.Sally@epa.gov]; Freyre, Dominique [Freyre.Dominique@epa.gov]
Subject: FW: EPA Response to NMED Letter
Attachments: Letter to NM Gov 71919.pdf

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

Hon. Michelle Lujan Grisham
Governor of New Mexico
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501

JUL 19 2019

Dear Governor Lujan Grisham,

We write in response to Secretary Kenney's July 2, 2019, letter regarding New Mexico's decision to actively pursue judicial enforcement against the United States Department of Defense ("DOD") under state law for PFAS contamination at Cannon and Holloman Air Force bases. The letter also asks EPA to reconsider its position "regarding collaborative federal/state PFAS enforcement under RCRA." It appears that the State is asking EPA to join the judicial action against DOD. While EPA is unable to accommodate that request, the Agency is working to assist the State in a number of ways described below.

As an initial matter, EPA is not permitted to bring a judicial action against another Executive Branch department or agency. This position is consistent with the Department of Justice's long-held view of the unitary executive theory, which is rooted in the President's constitutional authority to see that all laws are faithfully executed. *See* U.S. Const. Art. II; *Myers v. United States*, 272 U.S. 52 (1926). Under our constitutional scheme, that executive power of the United States is exercised in a unitary and uniform way under the President. A dispute between parties in the same branch of government is not justiciable because it does not satisfy the case or controversy requirement of Article III. Therefore, EPA's direct and confidential participation in judicial litigation against DOD would conflict with the unitary and uniform execution of the law.¹

Additionally, the State of New Mexico is authorized to implement the state's hazardous waste program in lieu of the federal RCRA program and is empowered to promulgate, implement, and

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enforce its program, including against federal facilities.² EPA's participation in related litigation is not required for the State of New Mexico to proceed against DOD.

Finally, consistent with the Administrator's recent Senate testimony, EPA supports New Mexico's role as a co-regulator and in this capacity is providing technical assistance to the extent that it is able to do so. EPA has committed substantial assistance to New Mexico and other states to help address the challenges PFAS presents. EPA Region 6 staff have been in regular contact with NMED to provide technical and other assistance. By way of example, EPA Region 6 has provided the following PFAS-related technical assistance within the past two years:

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2019

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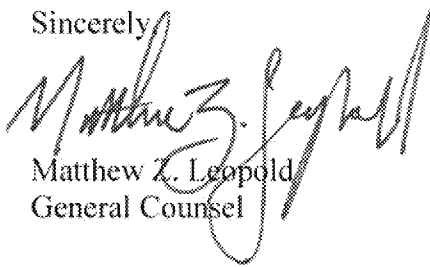
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EPA will continue to provide NMED with technical remediation information and other assistance under RCRA and otherwise. While we are not able to assist with the State's litigation against the federal government or with defending litigation brought against the State by DOJ, we will continue to provide NMED with PFAS-related technical assistance, consistent with such

² The assertion in your letter that "NMED is implementing RCRA on behalf of EPA under a primacy agreement" is not fully accurate. Under RCRA section 3006, 42 U.S.C. § 6926(b), a State may be authorized to implement a State's hazardous waste regulatory program "in lieu of" the federal RCRA hazardous waste program. RCRA does not provide for delegation of federal regulatory authority to a State. Therefore, New Mexico is carrying out its hazardous waste program under state law "in lieu of" the federal program; it is not implementing its hazardous waste program "on behalf" of EPA.

assistance to other states. We look forward to continuing our partnership with the State of New Mexico in addressing PFAS.

Sincerely

A handwritten signature in black ink, appearing to read "Matthew Z. Leopold".

Matthew Z. Leopold
General Counsel

A handwritten signature in black ink, appearing to read "Peter C. Wright".

Peter C. Wright
Assistant Administrator

CC: James C. Kenney

Message

From: DeRobertis, Cecilia [DeRobertis.Cecilia@epa.gov]
Sent: 7/22/2019 7:35:26 PM
To: Freyre, Dominique [Freyre.Dominique@epa.gov]; Freed, Elisabeth [Freed.Elisabeth@epa.gov]; Currie, Kayla [currie.kayla@epa.gov]; Neves, Peter [Neves.Peter@epa.gov]; Mooney, Charlotte [Mooney.Charlotte@epa.gov]; Foster, Barbara [Foster.Barbara@epa.gov]; Jones, Bruce [Jones.Bruce@epa.gov]; Dalzell, Sally [Dalzell.Sally@epa.gov]; Leff, Karin [Leff.Karin@epa.gov]
Subject: EPA Response to NMED Letter
Attachments: Letter to NM Gov 71919.pdf

Cannon AFB and Holloman AFB Team,

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I've attached EPA's response.

Thanks,
Ceci

Cecilia De Robertis | Assistant General Counsel

U.S. Environmental Protection Agency, Headquarters | Office of General Counsel

William Jefferson Clinton Federal Building | 1200 Pennsylvania Avenue, NW | Washington, DC 20460

phone: (202) 564-5132 | e-mail: DeRobertis.cecilia@epa.gov

Message

From: Leff, Karin [Leff.Karin@epa.gov]
Sent: 7/8/2019 9:17:29 PM
To: Freyre, Dominique [Freyre.Dominique@epa.gov]
CC: Muller, Marie [MULLER.MARIE@EPA.GOV]; Dalzell, Sally [Dalzell.Sally@epa.gov]
Subject: FW: EPA LETTER re PFAS Contamination at Cannon AFB and Holloman AFB.pdf
Attachments: EPA LETTER re PFAS Contamination at Cannon AFB and Holloman AFB.pdf

Karin Leff
Director, Federal Facilities Enforcement Office
US EPA-OECA
202.564.7068 (w)
202.236.3669 (c)

This message is CONFIDENTIAL and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

From: Gervais, Gregory
Sent: Monday, July 08, 2019 2:31 PM
To: Leff, Karin <Leff.Karin@epa.gov>
Subject: EPA LETTER re PFAS Contamination at Cannon AFB and Holloman AFB.pdf

FYSA

Message

From: Freed, Elisabeth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A3B6B41A37494CFBA37F4118A48C43AF-EFREED]
Sent: 7/22/2019 7:43:13 PM
To: Neves, Peter [Neves.Peter@epa.gov]
Subject: FW: EPA Response to NMED Letter
Attachments: Letter to NM Gov 71919.pdf

Hi Peter,

This just went to Charlotte and Barbara. Is there anything else ORCR wanted to discuss? This is the latest as far as I know.

Thanks, Elisabeth

From: DeRobertis, Cecilia
Sent: Monday, July 22, 2019 3:35 PM
To: Freyre, Dominique <Freyre.Dominique@epa.gov>; Freed, Elisabeth <Freed.Elisabeth@epa.gov>; Currie, Kayla <currie.kayla@epa.gov>; Neves, Peter <Neves.Peter@epa.gov>; Mooney, Charlotte <Mooney.Charlotte@epa.gov>; Foster, Barbara <Foster.Barbara@epa.gov>; Jones, Bruced <Jones.Bruced@epa.gov>; Dalzell, Sally <Dalzell.Sally@epa.gov>; Leff, Karin <Leff.Karin@epa.gov>
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William Jefferson Clinton Federal Building | 1200 Pennsylvania Avenue, NW | Washington, DC 20460
phone: (202) 564-5132 | e-mail: DeRobertis.cecilia@epa.gov

Message

From: Kenney, James, NMENV [James.Kenney@state.nm.us]
Sent: 4/18/2019 2:37:45 AM
To: Payne, James [payne.james@epa.gov]
CC: Hower, Jennifer, NMENV [Jennifer.Hower@state.nm.us]; Atencio, Christopher, NMENV [Christopher.Atencio@state.nm.us]; Gray, David [gray.david@epa.gov]; Seager, Cheryl [Seager.Cheryl@epa.gov]
Subject: RE: New Mexico USAF PFAS Litigation

Thank you, James!

From: Payne, James <payne.james@epa.gov>
Sent: Wednesday, April 17, 2019 5:10 PM
To: Kenney, James, NMENV <James.Kenney@state.nm.us>
Cc: Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>; Atencio, Christopher, NMENV <Christopher.Atencio@state.nm.us>; Gray, David <gray.david@epa.gov>; Seager, Cheryl <Seager.Cheryl@epa.gov>
Subject: [EXT] RE: New Mexico USAF PFAS Litigation

Secretary Kenney – thank you for your note. I’m reaching out to Jennifer separately to discuss next steps. Jim Payne 214-665-8170, 214-490-6707 cell

From: Kenney, James, NMENV <James.Kenney@state.nm.us>
Sent: Wednesday, April 17, 2019 7:27 AM
To: Payne, James <payne.james@epa.gov>
Cc: Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>; Atencio, Christopher, NMENV <Christopher.Atencio@state.nm.us>; Gray, David <gray.david@epa.gov>; Seager, Cheryl <Seager.Cheryl@epa.gov>
Subject: New Mexico USAF PFAS Litigation

Good morning, James -

I’m following up on an email exchange (below) and conversations at ECOS between David Gray and myself regarding the PFAS contamination at Cannon and Holloman Air Force Bases.

Can we set up a legal and technical support call between Region 6 and NMED to explore options under a deliberative process? Running point for us on logistics will be Jennifer Hower (General Counsel) and Chris Atencio (Counsel of record for the matter). We may include the New Mexico AG’s office as well since they are representing us in our legal proceedings.

Thank you,
James C. Kenney
Cabinet Secretary
New Mexico Environment Department
Desk (505) 827-2855 | Cell (505) 470-6161
@NMEnvDep | #IamNMED
www.env.nm.gov

Sent from my iPhone

Begin forwarded message:

From: "Gray, David" <gray.david@epa.gov>
Date: April 4, 2019 at 6:55:01 AM MDT

To: "Kenney, James, NMENV" <James.Kenney@state.nm.us>, "Traylor, Patrick" <traylor.patrick@epa.gov>
Cc: "Seager, Cheryl" <Seager.Cheryl@epa.gov>, "Hower, Jennifer, NMENV" <Jennifer.Hower@state.nm.us>, "Welton, Patricia" <Welton.Patricia@epa.gov>
Subject: [EXT] RE: New Mexico USAF PFAS Litigation

Good morning Secretary Kenney,

Confirming receipt of your note and we will follow up shortly. I've watched the testimony by the Administrator in response to Senator Udall's questions. My initial thought would have us bring in ORC/OGC also. I've copied Patricia Welton in our ORC office.

David

From: Kenney, James, NMENV <James.Kenney@state.nm.us>
Sent: Wednesday, April 3, 2019 11:02 PM
To: Gray, David <gray.david@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Seager, Cheryl <Seager.Cheryl@epa.gov>; Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>
Subject: New Mexico USAF PFAS Litigation

Hi David and Patrick,

I wanted to share with you an outcome of the Senate Appropriations hearing that occurred this morning. Administrator Wheeler committed to Senator Udall that EPA would technically and legally support our Department in the enforcement of the PFAS contamination at Cannon and Holloman AFB (see this [link](#) to launch the video and forward to the 1:59:09 mark). Administrator Wheeler also committed to Senator Udall to assist the Environment Department in a manner in which that preserves confidentiality between our organizations. I'd like to set up a call between EPA, the Environment Department and the New Mexico Attorney General to discuss legal and technical assistance from EPA. I assume we should work through Cheryl and would be happy to do so if that is what you recommend. Please advise and we'll get something scheduled asap.

We can also discuss briefly at ECOS next week.

Thank you,
James C. Kenney
Cabinet Secretary
New Mexico Environment Department
1190 St. Francis Drive | Santa Fe, New Mexico 87505
Office: (505) 827-2855 | Mobile: (505) 470-6161
Twitter: @NMEnvDep | #IamNMED
www.env.nm.gov

This email, including attachments, is for the sole use of the intended recipient(s) and may contain confidential or privileged information. If you are not the intended recipient, kindly let me know and delete the message. Namaste.

Message

From: Currie, Kayla [currie.kayla@epa.gov]
Sent: 7/23/2019 4:08:41 PM
To: Mackey, Cyndy [Mackey.Cyndy@epa.gov]; Gardner, Monica [Gardner.Monica@epa.gov]; Steiner-Riley, Cara [Steiner-Riley.Cara@epa.gov]; Berube, Anne [berube.anne@epa.gov]; Page, Phil [Page.Phil@epa.gov]; Sander, Matthew [Sander.Matthew@epa.gov]; Neves, Peter [Neves.Peter@epa.gov]
Subject: EPA Letter to NM Gov
Attachments: Letter to NM Gov 71919.pdf

Hi all,

Attached is a copy of the letter sent to the NM Governor on June 19th regarding assisting in their case involving DOD.

Thanks,

Kayla

Kayla Currie
Attorney-Advisor
U.S. EPA/OECA/OSRE/PPED, WJC-S 5226K
1200 Pennsylvania Ave., NW (MC 2271A)
Washington, DC 20460
Phone: 202-564-7358

This communication may contain privileged or confidential information. If you are not the intended recipient or believe you have received this communication in error, please contact the sender and please delete the copy you have received and do not print, copy, retransmit, disseminate, or otherwise use this information. Thank you.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

Hon. Michelle Lujan Grisham
Governor of New Mexico
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501

JUL 19 2019

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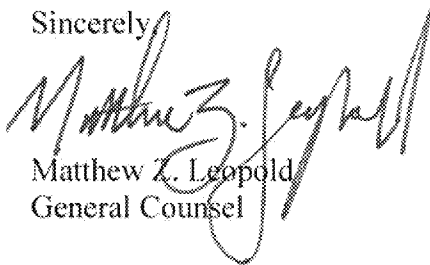
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Matthew Z. Leopold
General Counsel

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Peter C. Wright
Assistant Administrator

CC: James C. Kenney